LEGISLATION

Corporation Business Tax

P.L. 2001, C. 23 — Phase-out of Tax on S Corporation Income
(Signed into law on February 2, 2001) Provides for a three-year phase-out of the corporation business tax on the regular income of S corporations with an annual income in excess of $100,000.

The first year of the phase-out begins with privilege periods ending on or after July 1, 1998, but on or before June 30, 2001. For privilege periods ending on or after July 1, 2003, no tax is imposed.

For S corporations with income of $100,000 or less, tax is imposed at .5% for privilege periods ending on or after July 1, 1998, but on or before June 30, 2001. For periods ending on or after July 1, 2001, no tax is imposed.

The law also provides that the adjusted minimum tax amount shall be rounded to the next highest multiple of $10. This Act became effective immediately.

P.L. 2001, C. 136 — Payment Obligations of Certain Partnerships and Limited Liability Companies
(Signed into law on June 29, 2001) Provides a mechanism that assures the fair taxation of the owners of limited liability companies and limited partnerships. A limited liability company, foreign limited liability company, limited partnership, or foreign limited partnership that is classified as a partnership for Federal tax purposes may obtain the consent of each of its owners that are not individuals, trusts, or estates subject to the New Jersey Gross Income Tax Act, N.J.S.54A:1-1 et seq. (for example, each owner that is itself a corporation) that this State has the right and jurisdiction to tax the owner's income derived from the activities of the limited liability company or limited partnership in New Jersey. A business that does not have the consent of all its owners must pay a corporation business tax liability, on behalf of its nonconsenting owners, on each of the nonconsenting owner's shares of the business's New Jersey income.

The limited liability companies and limited partnerships will also make estimated payments of their nonconsenting members' current year's taxes. These payments will be based, where appropriate, on the prior year's income of the company or partnership.

Chapter 136 is effective, retroactively, for privilege periods beginning on or after January 1, 2001. Transition provisions exempt the companies and partnerships from making estimated payments for tax year 2001 and reduce the final payment of tax on behalf of the nonconsenting members for 2001, due in 2002, to 45% of the amount otherwise due to account for the enactment of the new provisions in the middle of a tax period.

Gross Income Tax

P.L. 2001, C. 84 — Exclusion of U. S. Military Pension and Survivor's Benefit Payments Expanded
(Signed into law on May 7, 2001) Amends the Gross Income Tax Act to allow all taxpayers, regardless of age, to exclude their U.S. military pension or military survivor's benefit payments from gross income taxation. This act took effect immediately and applies retroactively to taxable years beginning on or after January 1, 2001.

Inheritance Tax

P.L. 2001, C. 109 — Settlement of Intestate Estates
(Signed into law on June 21, 2001) Modifies the probate code with regard to settlement of intestate estates when heirs are missing or unknown. In such cases, the share of property to which the missing or unknown heirs are entitled would be held for a period of two years. After that period, if the heirs remain missing, the property would be divided among the known heirs. In cases where there are no known heirs, the bill provides that the property would be presumed abandoned and handled in accordance with the "Uniformed Unclaimed Property Act." Chapter 109 took effect immediately.

Insurance Premiums Tax

P.L. 2001, C. 131 — Nonprofit Health Service Corporations May Convert to For-profit Health Insurers
(Signed into law on June 29, 2001) Provides that a nonprofit health service corporation may convert to a for-profit (domestic stock) health insurer. After conversion, all insurance premiums collected by the domestic stock health insurer will be subject to the insurance premiums tax. The legislation also establishes a Health Service Corporation Conversion Temporary Advisory Commission consisting of 15 members within, but not of, the Department of the Treasury. This act took effect immediately.

Local Property Tax

P.L. 2001, C. 18 — Religious or Charitable Organizations May Lease Property to Other Exempt Entities Without Losing Property Tax Exemption
(Signed into law on January 29, 2001) Amends R.S.54:4-3.6 to permit a religious or charitable organization to lease property to another exempt entity for a different exempt use without the loss of its property tax exemption. The bill took effect immediately and was retroactive to September 30, 1999.

P.L. 2001, C. 85 — Exemption of Property of Firefighters' Organizations
(Signed into law on May 8, 2001) Amends R.S.54:4-3.10 to permit exempt firefighter's associations, firefighter's relief associations, and volunteer fire companies to conduct certain income-producing activities and retain their tax exemption. The income-producing activity that is not the organization's primary purpose must not exceed 120 days annually, and all net proceeds from that activity must be utilized in furtherance of the primary purpose of the organization or for other charitable purposes. The act took effect immediately and was retroactive to January 1, 1998.

P.L. 2001, C. 101 — Reassessments Required in Certain Circumstances
(Signed into law on June 14, 2001) Provides that when an assessor has reason to believe that property comprising all or part of a taxing district has been assessed at a value lower or higher than is consistent with the purpose of securing uniform taxable valuation of property, or that the assessment of property is not in substantial compliance with the law and that the interests of the public would be promoted by reassessment, then the assessor must make a reassessment of the property in the taxing district that is not in substantial compliance. Chapter 101 took effect immediately.

P.L. 2001, C. 106 — NJ SAVER Rebate
(Signed into law on June 18, 2001) Amends P.L. 1999, C. 63, to accelerate the phase-in period of the NJ SAVER Rebate Program from five years to four years. The legislation increased the amount to be paid in 2001 from 60% (an average of $360) to 83⅓% of the full amount (an average of $500).

P.L. 2001, C. 140 — Distribution of Miscellaneous Revenue
(Signed into law on July 2, 2001) Permits municipalities to distribute certain municipal revenues to real property taxpayers as a credit against property taxes owed for that local budget year. The credit must be more than one-tenth of a penny. Landlords of multifamily dwellings are required to "pass through" to their tenants any savings in property taxes realized. Chapter 140 took effect immediately.

P.L. 2001, C. 159 — Homestead Rebate
(Signed into law on July 16, 2001) Increases the maximum benefit under the Homestead Rebate Program for homeowners and tenants who are age 65 or older or disabled from $500 to $750 beginning with homestead rebates paid in calendar year 2001. For homestead rebates paid beginning in 2002, the maximum amount will be indexed annually to the cost of living.

For purposes of this legislation, "cost-of-living adjustment" is defined as the factor calculated by dividing the consumer price index for all urban consumers for the nation, as prepared by the U.S. Department of Labor as of the close of the 12-month period ending on August 31 of the tax year, by that index as of the close of the 12-month period ending on August 31 of the calendar year preceding the tax year in which the recomputation of the maximum homestead rebate is made.

This legislation increased the tenant homestead rebate paid in 2001 and thereafter to tenants who are not 65 or disabled to $100, eliminating the three-year phase-in which, under prior legislation, was scheduled to end in 2003. The legislation also increased the minimum rebate for tenants who are 65 or disabled to $100.

Miscellaneous

P.L. 2000, C. 80 — Earned Income Tax Credit
(Signed into law on August 14, 2000) Establishes a New Jersey Earned Income Tax Credit (EITC) program which will provide a refundable tax credit for eligible New Jersey residents with gross income of $20,000 or less who receive a Federal earned income credit that is based on having at least one "qualifying child." The amount of the New Jersey EITC will be equal to a percentage of the recipient's Federal earned income credit, with benefits to be phased in over four years. The New Jersey credit will amount to 10% of the Federal earned income credit for tax year 2000, 15% for tax year 2001, 17.5% for tax year 2002, and 20% for tax year 2003 and thereafter.

P.L. 2000, C. 161 — Uniform Partnership Act
(Signed into law on December 7, 2000) Enacts the "Uniform Partnership Act (1996)" as developed by the National Conference of Commissioners of Uniform State Laws and approved by the American Bar Association House of Delegates.

The law also makes certain changes to the Uniform Act which were recommended by the review committee of the New Jersey Bar Association. This legislation became effective on December 8, 2000.

P.L. 2001, C. 5 — Administrative Procedures Act
(Signed into law on January 16, 2001) Revises New Jersey's Administrative Procedures Act to enhance access to the rule-making process. The legislation requires regulatory agencies to publish a calendar of their rule-making plans, provides for an extension in the time allowed for comment on proposed rules, and ensures official response to members of the public petitioning an agency to adopt or change a rule.

The law also provides that, in reviewing an administrative law judge's decision, an agency head shall apply an elevated standard in deciding whether to reject or modify findings of fact as to the credibility of lay witness testimony, requires each rule-making agency to publish a table of specified matters that are of interest to regulated parties, and requires that administrative rules expire after five years.

This legislation took effect on July 1, 2001, but did not apply to any rule proposed in the *New Jersey Register,* or to any contested case filed prior to the effective date.

P.L. 2001, C. 24 — Energy Assistance Programs
(Signed into law on February 2, 2001) Provides for the appropriation of sales tax revenues to increase benefits under various energy assistance programs. This legislation took effect immediately.

P.L. 2001, C. 127 — Veterans' Benefits
(Signed into law on June 28, 2001) Expands certain veterans' benefits to those who served in Lebanon, or on board any ship actively engaged in patrolling the territorial waters of that nation, on or after July 1, 1958, for a period of at least 14 days commencing on or before November 1, 1958. Any person otherwise qualifying for veteran status under the bill who received an actual service-incurred injury or disability is to be classed as a veteran whether or not that person completed the 14 days' service requirement. This legislation took effect immediately.

P.L. 2001, C. 134 — Business Registration
(Signed into law June 29, 2001) Requires providers of goods and services to the State and its agencies, to casinos, and to subcontractors under those State and casino contracts to register their businesses with the Division of Revenue. This act took effect on September 1, 2001.

Petroleum Products Gross Receipts Tax

P.L. 2000, C. 156 — Phase-Out
(Signed into law on November 16, 2000) Phases out, over a three-year period, the Petroleum Products Gross Receipts Tax for fuel used to generate certain electricity. The legislation eliminates the application of this tax to the sale of fuel used by a utility, co-generation facility, or wholesale generation facility to generate electricity sold at wholesale or through certain retail sales channels. This law took effect January 1, 2001.

Sales and Use Tax

P.L. 2001, C. 90 — Sales and Repairs of Limousines Exempt
(Signed into law on May 10, 2001) Exempts sales of motor vehicles registered as limousines to limousine operators licensed in New Jersey. The legislation also provides an exemption for repairs of limousines, including replacement parts (but not the cost of labor), regardless of where the limousine service operator is licensed. The act took effect on July 1, 2001.

Unclaimed Property

P.L. 2000, C. 132 — Energy Assistance Funding
(Signed into law on September 21, 2000) Provides funding to an existing statewide nonprofit energy assistance organization that helps needy families pay their energy bills with temporary financial assistance. The supplemental funding would be derived from the unclaimed property held by the State's electric and gas utilities that is transferred to the State under the "Uniform Unclaimed Property Act (1981)." The law also creates the Unclaimed Utility Deposits Trust Fund to hold unclaimed utility deposits. This legislation took effect immediately.

COURT DECISIONS

Administration

Adequate Notice
Harry and Susan Dashoff v. Director, Division of Taxation, decided December 3, 1999; Tax Court No. 004747-98. The Division mailed to plaintiff's home address a notification of a pending audit examination of their records that was returned to the Division on December 5, 1995, due to it being unclaimed after three notices. On December 10, 1996, the Division sent plaintiff a notice regarding the basis of an estimated assessment that was also returned to the Division after being unclaimed pursuant to two notices. Thereafter, the Division sent a February 10, 1997, notice of assessment related to final audit determination to plaintiff's home address that was also returned to the Division as unclaimed from three delivery attempts. The notice of assessment determined that the plaintiff owed gross income taxes for tax years 1976 through 1995, excluding 1980 and 1994, for failure to file returns. After sending a June 30, 1997, notice of demand for payment of tax that also went unclaimed, the Division entered a certificate of debt (COD) against plaintiff on August 11, 1997, which the plaintiff acknowledged receiving.

On August 21, 1998, plaintiff filed a complaint with the Tax Court seeking relief from the COD. On April 30, 1999, the Division moved to dismiss plaintiff's Tax Court complaint as being filed untimely. Plaintiff filed an opposition to the motion to dismiss and a cross motion to suppress the Division's defenses because: (1) the Division's motion to dismiss the complaint should have been filed within 90 days after service of the answer, (2) the Division's failure to answer interrogatories and produce documents on October 16, 1999, (3) the requirement of certified mail without also regular mailing is a constitutional violation, and (4) the plaintiff did not receive the notices, and it would be inappropriate under the law and constitution to hold the plaintiff to the Division's estimated assessment.

As to the plaintiff's claim that the Division's motion to dismiss for untimely filing must be filed within 90 days of service of the answer, the Court ruled that the Division's motion was timely because Rule 4:6-2 permits a motion to dismiss for lack of subject matter jurisdiction to be made at any time in the pleadings.

Addressing the issue of whether the Division's motion should be suppressed because of the Division's failure to respond to interrogatories and produce documents, the Court dismissed plaintiff's claim because when a motion is made to dismiss for untimely filing the parties cease exchanging discovery during the pendency of the motion.

After examining the envelopes, the Court stated that they all showed the mailings were to plaintiff's last known address, there was adequate postage, and that there were several delivery attempts that were unclaimed and therefore returned to the Division. The Court ruled that the Division had complied with all statutes regarding mailing that required that notices of assessment be sent by certified mail to the plaintiff's last known address which is presumptive evidence of the plaintiff's receipt. Furthermore, the Court could not determine that either the statutory form of service was insufficient or that the statutory notice requirements violated the constitutional principles of procedural due process because the notice requirements are reasonably calculated to apprise the taxpayer of the pendency of an action and that there was an official mailing from the Division.

The Court held that the plaintiff's August 21, 1998, complaint was untimely as to the February 10, 1997, notice of assessment. The Court held that the Division complied with the statute by sending the notice of assessment by certified mail to plaintiff's home address, that failure to send the notice by regular mail does not invalidate the notice of assessment, and that the plaintiff failed to file a timely appeal within 90 days of the notice of assessment. Furthermore, the Court noted that the date of the assessment, not the date of the COD, fixes the time for challenging the underlying tax liability.

Responsible Person Status
Frank J. Miles v. Director, Division of Taxation, decided April 24, 2000; Tax Court No. 6310-98. At issue is whether plaintiff is a responsible person for employees' gross income tax (GIT) payroll withholdings that were not paid over to the Director and whether he is relieved of any liability by following his superior's directions not to make those payments.

Plaintiff was hired as the Chief Financial Officer, vice president and treasurer, of Accurate Information Systems, Inc. (AIS) reporting to the president, Mr. Stephen Yelity. Under plaintiff's employment contract, he was paid between $90,000 and $100,000 annually and initially granted 5% of the company's stock. Plaintiff had check signing authority and the Court found that he signed all company checks. Plaintiff had limited authority to hire and fire employees, signed, prepared and/or supervised the preparation of AIS tax returns, and was involved in

the financial aspects of the company. When plaintiff was hired, one of his responsibilities was to solve AIS's financial problems including tax liabilities owed to various states and the IRS. Plaintiff negotiated the IRS debt and either plaintiff or his corporation, MJ Financial Answers, lent AIS money, without any prospect of repayment, to make the final installment payment to the IRS.

The evidence showed that AIS payroll tax returns were filed but that tax checks were not remitted to the Division. The Court further found that vouchers authorizing payment of payroll taxes were prepared and that sometimes payroll tax checks were prepared and signed but not forwarded to the Division. Testimony indicated that Mr. Yelity directed plaintiff regarding which checks should be and should not be released over plaintiff's protests. Despite Mr. Yelity's testimony that the decision not to pay taxes was a joint decision, the Court found that it was specifically Mr. Yelity's decision not to pay the payroll taxes and that he decided who would be paid when there was not sufficient funds to pay all creditors.

The Court held that plaintiff was a responsible person and personally liable for AIS's nonpayment of payroll taxes. In making its determination, the Court applied the nine-factor test first articulated in *Cooperstein v. Director, Division of Taxation*, 13 N.J. Tax 68 (Tax 1993), aff'd. 14 N.J. Tax 192 (Appellate Division 1994*) certif. denied*, 140 N.J. 329 (1995). Then the Court compared the facts of this case with prior cases where individuals were found to be personally liable and opined that plaintiff had as great as or greater responsibility as they did.

Although the Court found that Mr. Yelity decided alone that payroll taxes would not be paid, the Court quoted Federal Circuit Court opinions that essentially stated that a superior's instructions not to pay taxes do not relieve an otherwise responsible person from his duty to ensure that taxes were paid. Furthermore, the Court noted that the issue of whether Mr. Yelity was a responsible person was not before the Court.

Regulations

Lenox Incorporated v. Director, Division of Taxation, decided February 2, 2001; Tax Court No. 007049-98 & 007050-98. The Court requested that the Division address the "function and significance" of N.J.A.C. 18:7-13.8(d) that required a taxpayer to file notice of Internal Revenue Service (IRS) changes to plaintiff's corporate taxable income within 90 days of the IRS changes in order to qualify for an extended two-year period to file for a refund. The Division submitted the Certification of William J. Bryan, III and a Supplemental Brief to the Court. Rather than respond to the brief, plaintiff served on the Division interrogatories concerning the explanations contained in the Supplemental Brief and the Bryan Certification. The Division objected to answering the interrogatories.

After analyzing well-settled case law, the Court found that the reasonableness of a regulation could not be a function of its factual foundation because factual findings are not required in order to promulgate a regulation. The Court stated: "In order to overturn a regulation as unreasonable and beyond the scope of the administrative agency's power, a party must demonstrate that no conceivable state of facts would sustain the regulation." Therefore, the Court ruled that the Division need not answer the interrogatories because any possible elicited factual information would not be relevant to the issue of the regulation's reasonableness nor would the answers lead to discovery of admissible evidence.

Timely and Conforming Complaint

Harold Weingold v. Director, Division of Taxation, decided February 7, 2001; Tax Court No. 1818-00. The Division sent plaintiff and plaintiff's lawyer the final determination concerning his protest by certified mail on January 25, 2000. Plaintiff's lawyer signed for his letter but plaintiff did not pick up his letter. On March 29, 2000, pro se plaintiff wrote a letter to the Tax Court Clerk stating: "Please accept this letter as a petition to accomplish the following: to inform your office I plan to represent myself before the Tax Court pro se, and to appeal the final determination by the Division of Taxation pursuant to New Jersey S.A. 54A:9-10." Several communications occurred between the Tax Court Management Office and plaintiff that resulted in plaintiff submitting additional information. Plaintiff was advised that his papers had been filed as of May 12, 2000.

The Court held that the March 29, 2000, letter indicated an intention to make a complaint, but was not in fact a complaint because it "does not comply in any respects with any way, shape, or form being a complaint which would be compatible with the rules." There was no named plaintiff, defendant, no claim, no fee submitted, and nothing that the Division could be charged with answering. The Court noted that pro se litigants are chargeable with the rules governing the content required to be in a complaint.

The Court also ruled that the letter sent and received by the lawyer attributes notice of the final determination to plaintiff as well as does the letter sent to plaintiff that he

did not collect. Therefore, the Court dismissed the May 12, 2000, complaint as untimely.

Untimely Complaint
Corrigan's, Inc. v. Director, Division of Taxation, decided June 15, 2001; Tax Court No. 000121-1999. On January 14, 1999, plaintiff filed a complaint in the Tax Court appealing the Division's October 13, 1998, Final Determination concerning a Sales and Use Tax and Corporation Business Tax assessment. The Division moved to dismiss the complaint due to its untimeliness.

After looking at various statutes concerning the aforementioned assessments, the Court ruled that plaintiff's complaint must be filed within ninety days after the date of the October 13, 1998, Final Determination. As the date of the Final Determination was October 13, 1998, the ninety-day period for appeal expired on January 11, 1999. Consequently, the Court granted the Division's motion.

Failure to State a Claim
Mayer & Schweitzer, Inc. v. Director, Division of Taxation, decided June 25, 2001; Tax Court No. 001800-2000. Plaintiff, domiciled in New Jersey, is a market maker and licensed broker dealer of securities in twenty-two states.

Initially, plaintiff filed 1992 – 1995 Corporation Business Tax (CBT) returns that allocated sales to New Jersey based upon the trader's location. Thereafter, plaintiff filed amended returns that allocated sales to New Jersey based upon the purchaser's location.

The Division moved under R. 4:6-2(e) to dismiss the complaint due to plaintiff's failure to state a claim upon which relief may be granted. The Court denied the Division's motion opining that plaintiff was entitled to an opportunity to present facts before the Court to show that the securities at issue were integrated with its business carried on in another state.

Interest Waiver Due to Reliance on Written Advice of Division
L&L Oil Service, Inc. v. Director, Division of Taxation, 18 N.J. Tax 514 (Tax Court 2000), aff'd as modified, June 26, 2001; Appellate Division No. A-3386-99T5. Plaintiff claims that interest on its tax liability should be waived because it reasonably relied upon several Division advisory letters, some of which are to other companies in the industry, and an article in the *New Jersey State Tax News*. Plaintiff sent a subpoena to a Tax Counselor, a Division employee, to testify about advisory letters she and her colleagues sent.

The Appellate Division upheld the Tax Court's quashing of the subpoena stating that plaintiff improperly sought to use the Division employee's testimony to advance alleged contrary legal conclusions citing authority that "expert witnesses may not render opinions on issues of law." Furthermore, the Court found that the testimony would have been of minimal relevance to the waiver issue because the inquiry and advisory letters were in the record.

The Appellate Division affirmed the Tax Court's holding that plaintiff could not rely upon advisory letters to other companies because differences in business operations may lead to different tax consequences.

The Tax Court found that none of plaintiff's inquiry letters fully and accurately described the nature of plaintiff's operations and neither the Division's correspondence nor the *New Jersey State Tax News* even suggested that plaintiff's actual maintenance and service operations were exempt from sales tax. The Appellate Division affirmed.

Standard for Court to Hear Motion for Reconsideration
Stephen Little Trucking and Stephen Little v. Director, Division of Taxation, decided July 9, 2001; Tax Court No. 005828-1999. Plaintiffs sought reconsideration of the Court's previous written opinion by essentially reiterating the arguments that were raised, considered, and rejected.

The Court denied the motion by ruling that plaintiffs failed to demonstrate either that the Court erred or that the opinion was arbitrary, capricious, or unreasonable. Consequently, the Court declined to readdress plaintiff's contentions.

Corporation Business Tax

Income Includable in the Numerator of Receipts Fraction
Stryker Corporation v. Director, Division of Taxation, 18 N.J. Tax 270 (Tax Court 1999); aff'd, Appellate Division, No. A-736-99T5 (July 21, 2000). At issue is whether the Division properly included in the numerator of Stryker's receipts fraction all receipts generated by drop-shipment transactions that occurred in New Jersey but which were destined for out-of-State customers.

Osteonics Corporation, a New Jersey corporation, is the wholly owned subsidiary of plaintiff Stryker Corporation, a Michigan corporation. Although Stryker and Osteonics are located in the same building in Allendale, New Jersey, Stryker paid all the real estate related costs.

Stryker manufactured hip and knee replacements. Stryker sold its products to its customers through its corporation Osteonics, whose sole function was to receive and process orders for Stryker's products. Osteonics' computers transmitted customers' orders to Stryker's computers. Then, Stryker packed and shipped the products to Osteonics' customers throughout the United States, via common carrier F.O.B. Allendale, without any intervention by Osteonics. Thereafter, Osteonics would bill its customers.

Upon the receipt of customers' payments, Osteonics would retain a portion of the receipts and remit the balance to Stryker. Although Stryker did not invoice Osteonics for each order, company representatives reviewed Osteonics' sales receipts in order to determine price and profit allocations. Essentially, Osteonics retained an approximate 20 percent gross margin and the payments from Osteonics to Stryker include a profit to Stryker.

In calculating the numerator of the receipts fraction, Stryker allocated sales to Osteonics by the shipment's destination state. Accordingly, for tax purposes, Stryker included sales of only New Jersey customer destination shipments in the numerator of the receipts fraction. Pursuant to an audit, the Division determined that all sales to Osteonics should be included in the numerator of the receipts fraction regardless of the ultimate destination state of the customer.

The Tax Court held that plaintiff's sales receipts from its direct shipments to Osteonics' out-of-State customers are includable in the numerator under N.J.S.A. 54:10A-6(B)(6). The Tax Court found that this statute required inclusion in the numerator of all receipts earned by the taxpayer in New Jersey including the intrastate transactions between plaintiff and Osteonics. The Tax Court also noted that the sales at issue were not includable under N.J.S.A. 54:10A-6(B)(1) because there were no physical shipments to Osteonics.

On appeal, the Tax Court was upheld. The Appellate Division found throughout all Stryker's arguments there existed a constant, single theme that for tax purposes the two transactions, the sale of the product to Osteonics and the sale by Osteonics to its customers, should be treated as one transaction. However, the Appellate Division disagreed, opining that these sales were includable in the receipts numerator under N.J.S.A. 54:10A-6(B)(6) because Stryker realized income from sales of manufactured products located in New Jersey to New Jersey based Osteonics.

Time Period to File Refund Claim

Godwin Pumps of America v. Director, Division of Taxation, decided January 22, 2001; Tax Court No. 001789-2000. Plaintiff's 1993 corporation business tax (CBT) return was originally due on January 15, 1994, and with the approved extension the deadline was July 15, 1994. Plaintiff paid the full CBT on June 30, 1994. On July 13, 1998, plaintiff filed an amended 1993 CBT return seeking a refund. The Division denied the refund claim because it was not timely filed pursuant to the N.J.S.A. 54:49-14 four-year statute of limitations as calculated per N.J.A.C. 18:7-13.8.

N.J.A.C. 18:7-13.8 states that generally the four-year statute of limitations for filing a CBT refund claim begins to run on the later of the date of payment or the filing of the CBT return. However, where filing and payment are made before the due date (the original due date of the return and not an extended due date), the return's due date is deemed to be the payment date and the statute of limitations runs from the date of payment. Applying that language to the instant case, the Court held that plaintiff's 1993 refund claim was untimely because it was filed (July 13, 1998) four years and 13 days after the 1993 CBT payment (June 30, 1994).

The Court dismissed plaintiff's argument that the CBT refund statute of limitations should be governed by N.J.S.A. 54:2-39 because that section applies to property taxes. Likewise, the Court also found that N.J.S.A. 54:49-6(b) was inapplicable because it applies to situations where a deficiency assessment is protested. Moreover, the Court reasoned that the Legislature could have adopted the language of N.J.S.A. 54:49-6(b) for governing the statute of limitations on CBT refund claims but that it did not.

Amount Includable in the Numerator of Receipts Fraction

Stryker Corporation v. Director, Division of Taxation, 18 N.J. Tax 270 (Tax Court 1999); aff'd, Appellate Division No. A-736-99T5 (July 21, 2000); aff'd, Supreme Court of New Jersey, A-27 September Term 2000 (June 14, 2001). Osteonics, a New Jersey corporation, is the wholly owned subsidiary of plaintiff Stryker, a Michigan corporation. Both corporations are located in the same building in Allendale, New Jersey. Stryker manufactures orthopedic hip and knee replacements and sells its products to Osteonics, whose function is to market, sell, and process customer orders for Stryker's products. After the order is placed, Stryker packs and ships the products to Osteonics' customers throughout the United States, via common carrier F.O.B. Allendale.

In calculating the numerator of the receipts fraction, Stryker allocated sales to Osteonics by the shipment's destination state. Accordingly, Stryker included sales of only New Jersey customer destination shipments in the numerator of the receipts fraction. Pursuant to an audit, the Division determined that all sales to Osteonics should be included in the numerator of the receipts fraction regardless of customer destination.

The Tax Court held that Stryker's sales receipts from its direct shipments to Osteonics' out-of-State customers are includable in the numerator under N.J.S.A. 54:10A-6(B)(6) because the receipts are earned in New Jersey but not includable under N.J.S.A. 54:10A-6(B)(1) because there were no physical shipments to Osteonics. On appeal, the Appellate Division upheld the Tax Court.

The New Jersey Supreme Court reviewed the legislative history of the Corporation Business Tax Act and addressed Stryker's three arguments: (1) the allocation formula violates the Commerce Clause, more specifically the doctrine of internal consistency; (2) these receipts are not other business receipts under N.J.S.A. 54:10A-6(B)(6); and (3) the Legislature's repeal of N.J.S.A. 54:10A-6(B)(3) implies their intent to exclude these receipts from the numerator.

The Court first addressed whether the application of the Division's methodology would cause manufacturers to be taxed twice in violation of the Commerce Clause; once on their transactions with the dealers and then a second time on their product shipments to the destination state. The Court rejected that argument noting that the doctrine of internal consistency requires that a tax is structured so that it would not result in multiple taxation if applied by every state. Because the manufacturer and dealer transaction is treated separately from the dealer and customer transaction, no state would require the manufacturer to allocate the receipts from the wholesaler's sale of the product. Hence, the Court held that there is no threat of multiple taxation and no Commerce Clause violation.

Addressing the issue of whether Stryker's sales to Osteonics were other business receipts under the general catch-all provision of N.J.S.A. 54:10A-6(B)(6), the Court rejected Stryker's claim that (B)(6) was inapplicable because (B)(1) and (B)(2) dealt specifically with the shipment's destination to determine whether or not the receipts are included in the numerator. It was noted that neither N.J.S.A. 54:10A-6 nor the regulations thereunder contemplated drop-shipment scenarios. The Court found that (B)(6) was not limited by (B)(1) or (B)(2) because the legislative history did not indicate that the product's ultimate destination should trump the determination of whether or not the receipt was attributable to the State. Under the substance over form doctrine, Stryker's drop-shipment transactions result in the realization of intrastate sales to Osteonics which fall into the (B)(6) catch-all net that permits the Division to plug loopholes in the Corporation Business Tax Act to effect a fair apportionment of receipts to the State.

Finally, the Court found that the deletion of N.J.S.A. 54:10A-6(B)(3) in 1967 was not done with the intention of restricting inclusion in the receipts fraction to only sales of product shipments to destinations in the State. Essentially, deleted section (B)(3) included sales where the orders were received or accepted in New Jersey and the property was located in New Jersey at the time of the order. Although the sales in the instant case would have been treated as New Jersey sales under this provision, the section did not encompass or even relate to out-of-State drop-shipment type sales.

Based upon the aforementioned, the Court held that the receipts at issue were included in the numerator of the receipts fraction. In a concurring opinion, Justice Stein addressed the concern of *amici curiae* that upholding the lower courts would unduly burden New Jersey manufacturers. Justice Stein stated that there was no incompatibility between legislation benefiting New Jersey manufacturers and the lower courts' rulings, and that the sales at issue would not have been includable had Osteonics been formed as a division rather than as a subsidiary.

Gross Income Tax

Calculation of Resident Tax Credit
Mark and Donna Regante v. Director, Division of Taxation, decided October 15, 1999; Tax Court No. 000496-1996. Plaintiff claims that in calculating the resident tax credit that both as a matter of statutory interpretation and constitutionality the fraction must be calculated so that deductions allowable in the numerator are limited to those allowable in the denominator. In other words, plaintiff claims that the methodology for determining income in the numerator should be identical with the methodology for determining income in the denominator.

Citing *Ambrose v. Director, Division of Taxation*, 198 N.J. Super. 546 (Appellate Division 1985), the Court held that the Division properly interpreted the statutory phrase "subject to tax" to refer to income actually taxed in the

other state. Furthermore, the Court noted that the Division's regulations correctly interpret the statute.

Plaintiff's claim that the Director's interpretation of the statute results in a denial of equal protection was also rejected as the Court held the statute is constitutional. The Court noted that a taxpayer residing in New Jersey and working in Pennsylvania would pay a different amount of tax to New Jersey than if the taxpayer earned the same income by working in New York. However, the Court concurred with the holding in *Jenkins v. Director, Division of Taxation*, 4 N.J. Tax 127 (Tax 1982) that there was no equal protection violation because the credit is applicable equally to all New Jersey residents. Furthermore, the Court ruled that plaintiff had failed to show that the legislative classification pertaining to the resident tax credit was irrational or arbitrary.

Calculation of Resident Tax Credit
Mark and Donna Regante v. Director, Division of Taxation, decided January 24, 2001; Appellate Division No. A-2105-99T5. On appeal from the Tax Court's holding in favor of the Division was the issue regarding whether the methodology for determining income in the numerator of the resident tax credit should exclude deductions not recognized by New Jersey even though the deductions are permitted in a foreign jurisdiction.

Affirming the Tax Court, the Appellate Division held that income not subject to tax in a foreign jurisdiction is excluded from the numerator in the calculation of the resident tax credit. The Court noted that the reasoning behind the legislation enacting the resident credit is to at least minimize, if not eliminate, double taxation. The Court also upheld the Tax Court's holding that there was no equal protection violation even though two New Jersey residents earning the same income in two different states may pay different income taxes to New Jersey. The Court reasoned, as did the Tax Court, that both residents are treated identically in terms of calculating the income subject to taxation in the foreign jurisdiction.

Time Period to File Complaint After Untimely Protest
Lunin v. Director, Division of Taxation, decided February 8, 2001; Tax Court No. 004219-2000. On April 13, 2000, the Division sent a notice of deficiency to plaintiff concerning gross income tax (GIT). Plaintiff sent a July 12, 2000, written protest to the Division via mail that was postmarked July 24, 2000. By letter dated August 8, 2000, the Division denied plaintiff's protest because it was filed after 90 days of the issuance of the notice of deficiency. On October 7 or 8, 2000, plaintiff mailed a complaint to the Tax Court that was received on October 12, 2000. The issue is whether the complaint was timely filed with the Tax Court.

N.J.S.A. 54A:9-2(b) provides that a GIT deficiency becomes an assessment after 90 days of the mailing of a notice of deficiency where taxpayer did not protest the deficiency pursuant to N.J.S.A. 54A:9-9. According to N.J.S.A. 54A:9-10(a), an appeal to the Tax Court must be filed within 90 days after the GIT assessment. Furthemore, N.J.S.A. 54:49-18(a) provides that the time to appeal to the Tax Court begins from the date of the Director's final determination.

The Court ruled that R. 1:3-3, which adds three days to the 90-day filing period in Tax Court, was not applicable to the statutes concerning the sending of a notice of deficiency, the filing of a protest, and transformation of the deficiency into an assessment by operation of law because these statutes are not proceedings in the Tax Court governed by N.J.S.A. 54:51A-18.

The Court found that the April 13, 2000, notice of deficiency became an assessment by operation of law on July 12, 2000, (equivalent to the date of the Director's final determination) because a protest was not timely filed with the Division; therefore, the date to file a timely complaint with the Tax Court expired 90 days thereafter on October 10, 2000. As filing with the Tax Court occurs upon receipt of the complaint, the October 12, 2000, receipt was held to be untimely.

Interest Deduction - Acquisition Indebtedness to Purchase S Corporation Stock
Sidman v. Director, Division of Taxation, decided June 28, 2001; Appellate Division No. A-5591-99T5. Plaintiff-shareholder purchased additional interests in an S corporation from other shareholders so that he controlled a majority of the corporate shares. Plaintiff's acquisition was financed with a personal note that provided for equal payments that included interest at 8 percent. The Division disallowed plaintiff's reporting the interest as a deduction from his S corporation pro rata share of income.

The Court held that a shareholder's interest payments to other shareholders for their S corporation stock was not deductible from his pro rata share because there was no authority to permit such a deduction. The statute's plain language did not specifically provide for an interest deduction on personal loans in this situation. Turning to Federal tax law, the Court distinguished an Internal Revenue Service notice that permitted S corporation shareholders to deduct interest in debt-financed acquisitions by stating that neither the statute nor the legislative history

reference the application of Federal principles to this issue. Furthermore, the legislative history revealed that the Legislature purposely placed a tax on gross income to limit deductions in order to avoid a perceived unfairness in the Federal system. In discussing *Dantzler,* where the Tax Court ruled that a partner could deduct interest connected to the acquisition of a partnership interest, the Court stated that the Gross Income Tax Act need not treat partnerships and S corporations alike as they are not identical entities. Moreover, unlike partnerships, S corporations have a separate and distinct legal identity apart from their shareholders.

Local Property Tax

Property Exempt Under Continued Character Exception

Job Haines Home for the Aged, Plaintiff v. Bloomfield Twp., Defendant, New Jersey Tax Court, decided February 16, 2001, Docket No. 001135-2000. Plaintiff was an established property tax exempt Title 15A nonprofit corporation operating both a skilled nursing and a residential health care facility situated on five acres. Plaintiff appealed when it was partially assessed at $1,250,000 for tax year 2000 for an under-construction (80% completed and unoccupied) assisted living facility. When complete, all three facilities were interconnected.

At issue before this Tax Court was whether as of the pretax year October 1, 1999, valuation date the partially-erected structure could be assessed for taxes if it was an addition to an existing tax-exempt structure. In order to obtain property tax exemption under N.J.S.A. 54:4-3.6, plaintiff had to show, in part, "actual use" for a specified exempt purpose. Intended or projected future use is not qualifying.

As concerns "actual use" prior courts had determined, "Even where the character of a building under construction and its adoption to exempt use are evident, a property tax exemption does not attach until actual use commences." See *Hillcrest Health Service System, Inc. v. Hackensack City,* 18 N.J. Tax 38 (1998), and *Holy Cross Precious Zion Glorious Church of God v. Trenton City,* 2 N.J. Tax 352 (1981). "The single thread that runs through the cases…is that there must be actual use made of the buildings in accordance with the exemption statute. Actual public use or being ready to provide such public use is the required quid pro quo." See *Grace & Peace Fellowship Church, Inc. v. Cranford Twp.*, 4 N.J. Tax 391 (1982).

However, this decision holds that Tax Court had previously carved out an exception to the "actual use" rule for property exhibiting a "continued exempt character." See *Paper Mill Playhouse v. Millburn Twp.*, 7 N.J. Tax 78 (1984). In *Paper Mill Playhouse,* exempt property which discontinued "actual use" for a two-year reconstruction period after it was destroyed by fire was allowed to retain exemption, reasoning that having been nontaxable it would not impact the municipal budget. The Court distinguished the *Paper Mill Playhouse* exception by explaining that it only applies where there is a preexisting exempt building, not on a vacant parcel.

Present plaintiff merely erected an addition to an already tax-exempt structure, was not an historic ratable, would not be an added assessment upon the construction's completion and exempt use, and was granted exemption under the "continued character exception."

Denial of Refund of Taxes Paid by Mistake

J.C. Trapper, LLC, Plaintiff v. City of Jersey City, Defendant, decided February 22, 2001; Tax Court of New Jersey; Docket No. 001816-2000. In this action, plaintiff, J.C. Trapper, LLC, sought to recover property taxes and interest paid to defendant Jersey City on property owned by the City. The subject two lots were vacated in 1976, in favor of adjacent landowner. In 1987, title to those lots reverted to Jersey City. However, plaintiff and its predecessor continued to pay property tax and interest totaling $492,741.06 on those lots from 1988 through part of 1999. Plaintiff sought refund of the amount paid based on N.J.S.A. 54:4-54 referred to as the "Taxpayer Mistake Provisions" which provides for the refund of taxes "…Where one person has by mistake paid the tax on the property of another supposing it to be his own…."

The Court cited *McShain v. Evesham Twp.*, 163 N.J. Super. 522, and *Farmingdale Realty Co. v. Farmingdale*, 55 N.J. 103, which both dealt with the provisions of N.J.S.A. 54:4-54. In *McShain,* plaintiff paid taxes on lots which, without their knowledge, were assessed to them but owned by others. A refund was ordered. In *Farmingdale,* the subject property was assessed twice. Judge Kuskin concluded that, if the payments in question were made "by mistake," refund is mandatory, not discretionary even though the statute provides that "the governing body…may return the money paid in error…." While the phrase "may return" might invest the governing body with discretion when a taxpayer has mistakenly paid taxes on property owned by another, such discretion is not applicable where a taxpayer has mistakenly paid taxes on property owned by the taxing municipality. The Court made the point that, in the former situation, the

municipality is entitled to collect the taxes, and the refund of a mistaken payment could have been made discretionary in the event no procedure is available to the municipality to obtain payment of taxes from the correct taxpayer. In the latter, no taxes were due the municipality, and the municipality may not retain taxes mistakenly paid.

The Tax Court defines "mistake" as used in N.J.S.A. 54:4-54 as a mistake of fact not a mistake of law. A mistake of fact can be illustrated by a misunderstanding of ownership and might be refundable. Taxes paid under a statute later declared to be unconstitutional are paid under a mistake of law and are not subject to refund.

Relief is available under N.J.S.A. 54:4-54 only when taxes are paid by a taxpayer who, when making payment, believes they are due because: (1) the taxpayer is unaware that an assessment on another's property is included in the assessment on the taxpayer's property; or (2) the taxpayer doesn't know the facts to enable him to dispute ownership of the property. The mistake (as per N.J.S.A. 54:4-54) cannot be simply an incorrect interpretation of, or erroneous action taken on the basis of, facts known to the taxpayer which provided a sensible basis for disputing ownership. If taxpayer is unsure of the ownership of a property, then taxpayer should file an appeal or a declaratory judgment action. The taxpayer may not seek relief under statute after paying the taxes for years and seeking no resolution of the ownership issue.

Because the Taxpayer Mistake Provisions broaden taxpayers' remedies beyond the statutory right to appeal, such an expansion is to be construed narrowly, especially when the additional remedy has no limitations period.

Court held that none of the payments made by plaintiff and its predecessors were made "by mistake" under N.J.S.A. 54:4-54. Plaintiff and its predecessors had knowledge of the facts relating to ownership of the property. This knowledge provided a plausible basis for contesting the obligation to pay. Neither sought a judicial determination to clear this up until approximately 11 years later.

In settling appeals for 1988, 1989, 1990, and 1993, plaintiff's predecessor not only failed to contest ownership, but also willingly accepted the property tax obligations on the subject property. As demonstrated by the settlement agreements and site plan application, predecessor did not pay taxes "by mistake." As its predecessor's assignee, plaintiff is chargeable with, and bound by, the significance of predecessor's acceptance of the tax obligations of the subject property.

In 1961, the New Jersey Supreme Court, in *Rosa Systems v. Linden Dari-Delite, Inc.,* 35 N.J. 329, 334, held that when a payment is made voluntarily, it "cannot be recovered on the ground that there was no liability in the first instance." A payment is not voluntary only if "induced by the wrongful pressure of the payee and the payor has no immediate and adequate remedy in the courts to resist (the payment)." Plaintiff and its predecessor had such an available remedy.

Although the assessor mistakenly assessed the subject property to plaintiff and its predecessor, plaintiff's knowledge of the ownership issue was not diminished. The mistake to which the Taxpayer Mistake Provisions of N.J.S.A. 54:4-54 refer is the mistake of the taxpayer, not that of the tax assessor or municipality.

The Court, based on four analyses, concluded that defendant did not realize a windfall by retaining the taxes it collected from third parties on property it owned. (1) Predecessor made prior settlements by allocating settlement of lots under appeal and aggregating assessable value as single economic unit. (2) As per *Liva Group, LLC v. Paramus Borough,* 17 N.J. Tax 609, "Barring proof of fraud or other compelling circumstances a settlement will be enforced in accordance with its essential terms." Predecessor agreed to the assessments. Predecessor and plaintiff (as successor-in-title and assignee) could not now attack the settlement. (3) Attempting to undo the settlement is a violation of the doctrine of judicial estoppel. "Judicial estoppel is an equitable doctrine precluding a party from asserting a position in a case that contradicts or is inconsistent with previous position or a related proceeding." *Tamburelli Properties Ass'n. v. Cresskill Bor.*, 308 N.J. Super. 326. For purposes of judicial estoppel, this litigation and the earlier tax appeals are related legal proceedings and the plaintiff may not now contradict what was earlier agreed upon. (4) Denying plaintiff relief is consistent with decisions in other contexts which permit municipalities to retain taxes and other monies which should not have been collected, such as a taxpayer who fails to appeal overassessments.

Sales and Use Tax

Admission Charges Imposed by Government Entities
Meadowlands Basketball Associates v. Director, Division of Taxation, decided July 24, 2000; Tax Court No. 000665-98. Plaintiff is the owner of the Nets of the National Basketball Association. Pursuant to a license agreement, the New Jersey Sports and Exposition Authority (NJSEA) leased the Continental Airlines Arena to

plaintiff for the Nets to play their home basketball games. The license agreement included the requirement that plaintiff charge, collect, and transfer to the NJSEA a 10% "admission impost" on the price of admission of each ticket sold to home games. The impost fee was included and separately stated on the face of each ticket.

Plaintiff did not charge or collect sales tax on the impost charge; however, it did collect and remit sales tax on the price of admission. Pursuant to an audit, the Division assessed plaintiff sales tax due on the 10% admission impost fee.

Plaintiff argued that the impost fee is exempt under N.J.S.A 54:32B-9(a)(1), which exempts from sales tax the purchase and sale of certain goods and services by specified governmental agencies. It was clear that NJSEA was a specified governmental agency as it was created pursuant to the New Jersey Sports and Exposition Authority Law, P.L. 1971 C. 137, N.J.S.A. 5:10-1 to -38. However, the Court ruled this particular exemption only applies to situations where NJSEA is the vendor, purchaser, user or consumer, not where it imposes an admission charge.

The Court found that N.J.S.A. 54:32B-9(a) does not apply to admission charges imposed by government entities to athletic events because it is addressed in N.J.S.A. 54:32B-9(f). Paragraph (f) states that admission charges collected by State agencies are exempt from sales and use tax except in the case of collection of admission charges to athletic games. In the case of athletic games, the statute states that admission charges are exempt only if they inure exclusively to the benefit of elementary or secondary schools. As NJSEA used the impost charge to fund its statutory mandate of constructing and operating professional sports facilities in New Jersey, the admission charges were held to be subject to sales tax.

Finally, the Court reviewed a New York Tax Appeal Tribunal decision concerning nearly identical facts that granted an exemption in this situation after finding that admission charges are a service. The Court found three reasons as to why the New York decision was not persuasive. (1) Decisions of New York courts are not binding on New Jersey courts or controlling in interpreting New Jersey statutes. (2) The New York determination was decided by an administrative tribunal, not a court, and was not subject to judicial review. In New York, the taxing authority cannot seek review of an adverse administrative tribunal decision. (3) A comparison of the New York and New Jersey statutes concerning admission charges reveals a significant difference in that New York does not include political subdivisions or state agencies in the admission charge discussion. On the other hand, N.J.S.A. 54:32B-9(f) is dispositive of the issue of taxability.

Calculation of the Average Annual Volume
Continental Gypsum Co. v. Director, Division of Taxation, decided November 1, 2000; Tax Court No. 002150-99. The sole issue revolved around the proper calculation of the base level of volume (BLV) to determine the use tax exemption attributable to purchases of natural gas. In general, an eligible person's exemption is based on their BLV, which is equal to their average annual volume (AAV) of non-utility natural gas units purchased and delivered between January 1, 1992, and December 31, 1995. The Director explained via Public Notice, 29 N.J. Reg. 5029(b), that the calculation of the AAV was based upon actual purchases between 1992 and 1995 divided by the number of years the eligible person was in operation between 1992 and 1995. Therefore, if no purchases were made in any calendar year between 1992 and 1995, then that year would not count in the computation. Similarly, if non-utility gas was purchased only in 1995, then the total 1995 purchases would equal the BLV.

In July 1995, plaintiff Continental Gypsum Co. (CGC) commenced purchasing and accepting deliveries of non-utility gas. CGC purchased 473,070 therms in 1995, 3,399,160 therms in 1996, and 4,820,116 therms in 1997. The Director determined that CGC's BLV was 473,070, the total 1995 purchases. First, CGC argued that average annual volume should be based upon its 461,411 therm full monthly production capacity, which was reached in October 1997, multiplied by twelve, or 5,536,932 therms. Alternatively, CGC claimed that its BLV should be 1,474,440 therms, its December 1995 purchases of 122,870 therms multiplied by twelve.

In upholding the Director's Final Determination, the Court reasoned that the Director's interpretation of calculating BLV was not unreasonable. The Court dismissed CGC's first claim by ruling that the statute was clear that any year subsequent to 1995 could not be used in calculating the BLV. Addressing CGC's second claim, the Court ruled that "CGC had failed to demonstrate that the Director's interpretation was unreasonable and furthermore that the Director's interpretation was more reasonable than either of CGC's alternative proposals." The Court stated that the "Director's construction is reasonable, as it is surely not 'plainly unreasonable.' " Although the Court noted that there were several other reasonable alternatives that could be employed to calculate the BLV, it lacked authority to implement a

method of calculation more reasonable than the Director's method.

CGC also claimed that the Director's Public Notice was *de facto* rulemaking that is prohibited under the Administrative Procedures Act. The Court found that this Notice was essential because the statute could be interpreted several different ways. The Court noted that although an assemblyman had contested the Director's method of calculation, the legislation was not amended. In distinguishing *Metromedia v. Director, Division of Taxation*, 97 N.J. 313 (1984), the Court held that there was no requirement that the Director's pre-audit determination be adopted by a formal regulation.

Prototypes

Urso & Brown, Inc. v. Director, Division of Taxation, decided January 4, 2001; Tax Court No. 000051-99. Plaintiff is in the business of designing and producing point-of-purchase displays for merchandise sold in retail stores. Initially, plaintiff completed a design sketch of a display for a customer. If the customer approved the sketch, plaintiff engaged a fabricator to prepare a prototype with materials selected by plaintiff. The fabricator prepared the prototype along with drawings or blueprints for the display. Plaintiff inspected, paid for, and presented the prototype to the customer for review but did not charge its customers for the creation of the prototypes at issue. If the customer decided to place an order, plaintiff commenced to manufacture the displays. The prototype generally has no further utility and was not alleged to be for resale. At issue is whether the prototypes are subject to sales and use tax and, if so, whether they qualify for either the production or research and development exemption.

In deciding which entity purchased the materials, the Court found that plaintiff provided the materials to make the prototypes to the fabricators. Therefore, the Court ruled that the prototype purchases constituted tangible personal property upon which fabrication services were performed and, therefore, subject to either sales tax under N.J.S.A. 54:32B-3(b)(1) or use tax via N.J.S.A. 54:32B-6(C). Furthermore, the Court ruled that the transactions between plaintiff and the fabricators did not qualify for an N.J.S.A. 54:32B-2(e)(4)(A) exclusion as professional or personal service transactions where the prototypes were an inconsequential element of the transaction because the real object of the transaction was to acquire the prototypes for use as a sales generating device. Finally, the Court noted that even if the fabricators had provided the materials to make the prototypes, the transaction would be a taxable sale of tangible personalty under N.J.S.A. 54:32B-(a) or B-6(A).

Turning to whether or not the prototypes qualified for exemption from the Sales and Use Tax Act, the Court ruled that the prototypes did not qualify for the N.J.S.A. 54:32B- 8.13(a) production exemption because the prototypes were neither necessary for nor directly and primarily used in the manufacturing process. The Court also held that the transaction did not qualify for the N.J.S.A. 54:32B-8.14 research and development exemption because the prototypes were used as a sales generating device and were not used directly and exclusively in research or development. Furthermore, the Court found the prototypes were not purchased for or used in "research and development in the experimental or laboratory sense" because the use of the prototypes to satisfy specific customer requirements is not in the "nature of a study which seeks new knowledge in, or a new understanding of, a scientific or technical field or subject."

Complimentary Alcoholic Beverages

GNOC, Corp. t/a The Grand v. Director, Division of Taxation, decided April 3, 2001; Supreme Court of New Jersey No. A-35 September Term 2000. Plaintiff purchased alcoholic beverages from its wholesaler free of sales tax pursuant to a resale certificate. Upon audit, the Division assessed use tax on the purchase price of alcoholic beverages that were provided to patrons on a complimentary basis.

Addressing the issue of whether the purchase of alcoholic beverages constituted a nontaxable sale for resale, the New Jersey Supreme Court affirmed the Appellate Division's and Tax Court's determination that there was no resale of the alcohol because there was either no consideration or legally insufficient consideration for the complimentary drinks. Therefore, the transaction between plaintiff and the wholesaler constituted a taxable retail sale and not a nontaxable sale for resale.

The New Jersey Supreme Court next addressed the issue of whether the wholesaler's sales to plaintiff are exempt from sales tax because they are beverage sales for human consumption off the premises where sold under N.J.S.A. 54:32B-8.2. After reviewing the legislative history, the Court found that when the Legislature exempted the sales tax on retail sales of alcoholic beverages by enacting the exemption under N.J.S.A. 54:32B-8.34, it simultaneously deleted the exclusion for alcoholic beverages from the N.J.S.A. 54:32B-8.2 exemption. However, when the Legislature re-enacted legislation that effectively subjected alcoholic beverages to the retail sales tax by repealing the

exemption under N.J.S.A. 54:32B-8.34, it inadvertently failed to re-enact the exclusion for alcoholic beverages from the N.J.S.A. 54:32B-8.2 exemption. Regardless, the Court found that alcoholic beverages (on and off premises) were made subject to taxation under the Assembly Appropriations Committee Statement to Assembly Bill No. 3610, P.L. 1990, C. 40. Furthermore, the Court found the fact that alcoholic beverages were not included as products entitled to the 50 percent sales and use tax exemption provided to retailers located in urban enterprise zones to be further evidence of its taxability. Based upon the aforementioned, the Court held that the Legislature clearly intended to subject all alcoholic beverages to sales and use tax regardless of whether they were for consumption on or off the premises.

Complimentary Alcoholic and Nonalcoholic Beverages
Adamar of New Jersey t/a Tropicana Casino and Resort v. Director, Division of Taxation, decided April 3, 2001; Supreme Court of New Jersey No. A-36 September Term 2000. As to the issue of taxability of complimentary alcoholic beverages, the facts are identical to the companion case of *GNOC v. Director, Division of Taxation*. The Court affirmed the decision of the Appellate Division as supplemented by the Supreme Court's opinion in *GNOC*.

As to the issue of taxability of nonalcoholic beverages provided as complimentary beverages, the Court also affirmed the Appellate Division's decision to remand to the Tax Court the issue of the scope of the closing agreements between the plaintiff and the Division**.**

Admission Charges Imposed by Government Entities
Meadowlands Basketball Associates v. Director, Division of Taxation, 19 N.J. Tax 85 (Tax Court 2000), aff'd April 26, 2001; Appellate Division No. A-187-00T1. Plaintiff is the owner of the Nets of the National Basketball Association. Pursuant to a license agreement, the New Jersey Sports and Exposition Authority (NJSEA) leased the Continental Airlines Arena to plaintiff for the Nets to play their home basketball games. The license agreement included the requirement that on behalf of the NJSEA plaintiff charge, collect, and transfer to the NJSEA a 10% "admission impost" on the price of admission of each ticket sold to home games. The impost fee was included and separately stated on the face of each ticket. Plaintiff did not charge or collect sales tax on the impost charge; however, it did collect and remit sales tax on the price of admission. Pursuant to an audit, the Division assessed plaintiff sales tax on the 10% admission impost fee.

The Tax Court held that the impost fees to the Nets games were subject to sales tax as admission charges to athletic events under N.J.S.A. 54:32B-9(f)(2) because the proceeds did not inure exclusively to the benefit of elementary or secondary schools. The Court found a New York Tax Appeal Tribunal case with similar facts to be unpersuasive. Plaintiff appealed on the basis that the impost fee is exempt under N.J.S.A. 54:32B-9(a)(1), which generally exempts from sales tax a governmental agency's amusement charges and sales of goods and services.

The Appellate Division affirmed. The Court ruled that the impost fee was an admission charge, not an amusement charge or a sale of goods or services, and therefore did not qualify for the subsection 9(a)(1) exemption. Regardless, even if the impost fee was found to be exempt under 9(a)(1), the Court ruled that the impost fee would be subject to the subsection 9(f)(2) provisions concerning admission charges to athletic events. To be exempt under this subsection, the proceeds of admission charges to the Nets basketball games must inure exclusively to the benefit of elementary or secondary schools. Per statute, these proceeds were used only for the purposes of NJSEA. Therefore, the impost fee was held to be subject to sales tax. Finally, the Court found the unpublished New York Tax Appeal Tribunal holding that admission charges qualify as services to be unpersuasive because the decision did not consider New York's counterpart to subsection 9(f).

Sales of Materials and Supplies to Contractors
Stephen Little Trucking and Stephen Little v. Director, Division of Taxation, decided May 29, 2001; Tax Court No. 005828-1999. Plaintiff was engaged in the business of selling sand, gravel, mulch, and similar materials to contractors. Although plaintiff concedes that these sales were taxable, plaintiff neither collected sales tax nor obtained direct payment certificates because he claims he is not a person required to collect tax from contractors.

The Court found that there are two statutory provisions that address this issue. First, the relevant section of N.J.S.A. 54:32B-2(w) defines a person required to collect tax as every vendor of tangible personalty. One exception to the definition is that a vendor selling supplies and materials to contractors is not deemed to be a person required to collect tax and the contractor is required to pay the tax directly to the Director. The pertinent part of the second section, N.J.S.A. 54:32B-12(b), provides that in order to prevent the evasion of tax there is a presumption that all receipts from retail sales of tangible personalty are subject to tax until the contrary is established by the person required to collect the tax or the

customer. Additionally, this section allows the Director to authorize contractors to pay the tax directly to the Director and thereby waive the vendor's obligation to collect tax where the contractor has been issued a direct payment permit.

The Court held that plaintiff had an obligation to collect sales tax because plaintiff did not collect direct payment certificates from the contractors. Furthermore, the Court ruled that a contractor's difficulty in obtaining a direct payment permit would not be a basis for not collecting sales tax. The Court cited the simultaneous amendments to both sections, legislative intent, the Director's regulations, and the object and policy concerns of the Sales and Use Tax Act, such as effectively collecting and preventing evasion of taxes, in support of its ruling.

Over plaintiff's objections that sections 2(w) and 12(b) are independent of each other, the Court ruled that those sections were, in fact, complementary. The legislative history revealed that 1968 legislation amended both sections so that vendors were relieved from the responsibility of collecting sales tax on sales to contractors in section 2(w) and at the same time legislation added to section 12(b) permitted the authorization of direct tax payments to contractors. If the sections were read independently, the Court determined that the vendor would have no obligation to collect tax on a sale to an unidentified contractor and the Division would be handicapped in identifying the contractor and collecting the tax. The Court also found that the Director's regulations provide that a contractor must pay sales tax at the time of the materials' and supplies' purchase except where the contractor issues a direct payment certificate and then the vendor is not required to collect sales tax. (See N.J.A.C. 18:24-5.)

Maintaining or Servicing Real or Personal Property

L&L Oil Service, Inc. v. Director, Division of Taxation, 18 N.J. Tax 514 (Tax Court 2000), aff'd as modified, June 26, 2001; Appellate Division No. A-3386-99T5. Plaintiff is in the business of pumping waste oil, sludge, and antifreeze from storage tanks located on both commercial and residential properties into its trucks. After removal, the waste materials were transported to plaintiff's facility where the waste was either refined or processed for sale.

Customers paid plaintiff to remove the materials and sometimes clean the tank. Plaintiff's invoices usually charged a lump-sum price for pumping and removal without charging sales tax. However, a few invoices included a separate transportation fee and a few charged sales tax.

Pursuant to an audit the Division assessed sales tax on sales for the removal of waste materials where sales tax was not previously charged. The Tax Court upheld the Division's assessment and the Appellate Division affirmed.

The Tax Court held that plaintiff's waste removal services were subject to sales and use tax because they constituted maintenance or servicing, and the removal allowed the tanks to be used again for their intended purpose of collecting waste. The Appellate Division modified the holding stating that plaintiff's services did not maintain property because the word maintain "…connotes more the concept of repair or preventive maintenance as opposed to emptying a tank so that it can be refilled." The Appellate Division held that the removal of waste fluids from a tank that remains in use for the benefit of the user falls under the term servicing.

The Appellate Division upheld the Tax Court's rejection of plaintiff's alternative theories of nontaxability on the basis that the charges to its customers were exempt (1) as acquisition of raw materials because L&L was not the purchaser; (2) as transportation charges after granting an allocation of the lump-sum charge between removal and transportation; and (3) because plaintiff did not have a license from the Department of Environmental Protection (DEP) to perform maintenance or repair involving hazardous waste contained in storage tanks, even if such license was required. The Appellate Division noted that nothing in the DEP statutes or regulations indicated that plaintiff's removal business did not constitute providing a service. Furthermore, the DEP statutes and Sales and Use Tax Act could not be read in *pari materia* because they don't have the same purpose or object; DEP statutes were enacted to prevent groundwater pollution whereas the Sales and Use Tax Act was enacted to raise revenue.